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CASE NOS.: 2001-LHC-01459/1460/1461/1462/1463

OWCP NOS.: 01-147578/01-144383/01-144382/01-148393/01-148394

In the Matter of

STEPHEN WASKIEWICZ
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

Appearances:

David Neusner, Esquire (Embry & Neusner), Groton, Connecticut,
for the Claimant

Edward W. Murphy, Esquire (Morrison, Mahoney & Miller), Boston, Massachusetts,
for the Employer/Self-Insurer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This matter arises from a claim for workers' compensation benefits under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "Act"). A hearing was conducted before me in New London, Connecticut on May 30, 2001 and continued on July 10, 2001, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Director, Office of Workers' Compensation Programs (OWCP), did not appear at the hearing. The Claimant and two witnesses called by the Employer testified at the hearing, and documentary evidence was admitted as Administrative Law Judge Exhibits 1-5, Joint Exhibit 1, Claimant's Exhibits 1-19, and

Respondent's Exhibits 1-19, 21-22.[1] [2] TR1. at 6-7, 11-17, TR2. at 6, 31-32. Prior to adjourning the hearing on May 30, 2001, the parties expressed their intention to take numerous depositions, and it was agreed that the hearing would reconvene the week fo July 9, 2002 to hear testimony from witnesses who could not be deposed by that date. TR1. at 61-67. In addition, the Employer agreed to continue paying the Claimant compensation benefits until post-hearing evidentiary development was completed. TR1. at 66. On July 20, 2001, Claimant's counsel offered the deposition of Dr. Frank Maletz, taken on June 11, 2001 as CX 20. At the close of the reconvened hearing on July 10, 2001, the record was held open for the submission of Dr. Willetts' deposition and closing arguments. TR2. at 79-80. On July 27, 2001, Employer's counsel offered the deposition of Dr. Willetts as RX 20, and on August 14, 2002, the Employer filed its closing argument. Pursuant to leave granted at the hearing and in the absence of any objection, this evidence is admitted into the record.[3]

Subsequently, by letter dated November 21, 2001, Claimant requested leave to admit a report dated November 16, 2001 from Dr. Patrick Doherty, recommending that the Claimant undergo anterior cervical discectomy and fusion, as newly discovered evidence which is highly relevant and was unavailable until November 16, 2001, as CX 22. By letter dated November 27, 2001, Employer advised the Court of its assent to the admission of Dr. Doherty's report and, in the interest of fairness, moved to admit a note dated August 27, 2001 from Claimant's treating physician, Dr. Maletz, regarding the neck surgery, as RX 23. Subsequently, by letter dated December 7, 2001, Claimant offered Dr. Maletz' note dated October 24, 2001 "for the sake of completeness," as CX 23. As no objection has been raised, this additional evidence is admitted, and the record is now closed.

After careful analysis of the evidence contained in the record and the relevant case law, I have concluded that the Claimant is entitled to an award of temporary total disability compensation, interest on unpaid compensation, medical care, and attorney's fees. My findings of fact and conclusions of law are set forth below.

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[1] The following references will be used in this decision: "ALJX" for the formal papers offered by the Administrative Law Judge, "JX" for an exhibit offered jointly by the Claimant and the Employer, "CX" for an exhibit offered by the Claimant, "RX" for an exhibit offered by the Employer, "TR1." for the transcript of the official hearing held on May 30, 2001, and "TR2." for the transcript of the official hearing held on July 10, 2001.

[2] Objections were made and overruled on the record to CX 15, RX 15, and RX 17, and these documents were admitted into evidence. TR1. at 11-17. The parties have not requested reconsideration, and accordingly, these rulings stand.

[3] To ensure its admission, on August 14, 2001, Claimant's counsel offered a duplicate copy of the deposition transcript of Paul Murgo, which was taken on June 18, 2001 and previously admitted as CX 18.

II. Stipulations and Issues Presented

The parties offered the following stipulations which I now adopt as my findings:

(1) the Claimant had the following injuries: neck on August 21, 1991; knees on May 27, 1997; carpal tunnel syndrome on July 2, 1998; back/neck on July 9, 1998; and, back/groin on July 27, 1999;

(2) the parties are subject to the Act;

(3) an employer-employee relationship existed at the time of the injuries;

(4) the injuries arose in the course of and within the scope of employment;

(5) the Employer was timely notified of each of the injuries;

(6) the notices of the injuries pursuant to section 12 of the Act to the Employer and to the Secretary of Labor were timely filed;

(7) the notices of controversion were timely filed;

(8) an informal conference was held on February 14, 2001;

(9) disability resulted from the injuries;

(10) medical benefits were paid under section 7 of the Act in the amounts of $1,785.21 on July 2, 1998 and $10,318.51 on July 27, 1999;

(11) the Employer has been paying temporary total disability benefits for the July 2, 1998 carpal tunnel syndrome injury since March 30, 2001 at $604.06 per week;

(12) the Employer paid temporary total disability benefits for the July 27, 1999 back/groin injury from July 28, 1999 to October 17, 1999 at $658.58 per week for a total of approximately $6,585.80;

(13) the Claimant has a permanent disability because of his cervical and lumbar spine condition at a disputed percentage;

(14) the Claimant's average weekly wage is $987.87;

(15) the Claimant has not reached maximum medical improvement; and,

(16) at the informal conference on February 14, 2001, the Employer agreed to authorize the carpal tunnel surgery.

JX 1; TR1. at 21. The parties further agreed that the unresolved issues are (1) the nature and extent of the Claimant's disability; (2) the Claimant's wage earning capacity; and, (3) the Claimant's entitlement to various forms of medical care, including ongoing chiropractic treatment, treatment for anxiety and depression, and various medications. JX 1; TR1. at 7.

III. Summary of the Evidence

A. The Claimant's Testimony

The Claimant, Stephen Waskiewicz, testified that he was born on November 20, 1945 and was educated through high school, where he was an average "C" student. TR1. at 24. After high school, he went into the United States Marine Corps reserve, spending six months in active duty as an infantryman and about four and a half to five years in reserve status. *Id.* After his discharge around 1964, the Claimant worked for Burroughs Corporation, a printing business, in Tallum, Connecticut, for about eight years. *Id.* at 24-25. His job duties involved quality control, production control, and expediting. *Id.* at 25. About January 1976, the Claimant began working for the Employer, Electric Boat, in the Groton, Connecticut shipyard on the Thames River. *Id.* From 1976 to 1999, he worked as a rigger and then spent one year as a rigging instructor. *Id.* at 26. He described his job as a rigger as strenuous, using cranes to install Navy components, and he was eventually trained as a TLD worker to work with radiation in the reactors. *Id.* The Claimant also testified that rigging involved servicing other tradespeople. *Id.* For instance, when a machinist needed to install a component from the dock to the boat, the rigger was responsible for determining the easiest and safest way to maneuver the component, using different types of equipment like chain falls, come-alongs, and wire shackles. *Id.* at 26-27. In doing this work, the Claimant would put harnesses, straps, and wires around the component, pick it up with the chain fall, and then move it from one location to another. *Id.* at 27.

The Claimant testified that over time, the lifting requirements of the job became a problem and he had difficulty working in confined spaces where he would often bang his head. *Id.* In his earlier years with the Employer, the Claimant was required to climb all day long, routinely carrying chain falls that weighed about 42 and 60 pounds. *Id.* at 28. On or about March 19, 1976, the Claimant broke his right ankle in four places when he and his partner were pulling down on a steamboat ratchet, a defective pin broke, and the Claimant fell over the side. *Id.* at 28-29. Dr. Derby treated the Claimant for his ankle injury, putting pins, screws and plates in his right ankle, and the Claimant was out of work for about nine or ten months. *Id.* at 29. After he returned to work, the Claimant experienced problems with the hardware and had to undergo further surgery. *Id.* He eventually developed arthritis and continues to have problems with the ankle giving out, pain and aching, and walking long distances. *Id.* at 29-30.

The Claimant testified that he enjoyed his job and believed that he was respected by his peers and his supervisor. *Id.* at 30. He also testified that as a result of the lifting in his job, he underwent four hernia operations. *Id.* Because of the recurrent hernias, the Claimant described sharp pains in the surgical area after having sex and numbness after extensive lifting. *Id.* at 31. He described the hernia as an inguinal hernia on the right side. *Id.*

On or about August 21, 1991, the Claimant injured his back and neck when he was bending and pulling on big hawser nylon lines at an angle. *Id.* Dr. Derby treated him at that time with medication, stretching, and strengthening exercises. *Id.* at 32. He believed that he was out of work because of the injury. *Id.* The Claimant testified that he has not fully recovered from this injury, which he describes as his worst injury. *Id.* He stated that turning his head causes pain and when he drives, his neck locks up if he has to turn his head quickly. *Id.* at 32-33. After the 1991 injury, the Claimant testified that he had gone to the yard hospital and reported other injuries a couple of times, but he could not recall any specific injuries. *Id.* at 33.

After Dr. Derby retired, the Claimant received treatment from another doctor in Gale's Ferry in order to learn therapeutic exercises and receive neck traction. *Id.* He also received treatment from Dr. Deveau, a chiropractor, for his neck injuries. *Id.* Dr. Deveau was successful in alleviating the Claimant's headaches, which could be so incapacitating that they caused vision impairment. *Id.* at 32-33. The Claimant has been treating with Dr. Deveau for a couple of years. *Id.* at 34. Most recently, Dr. Maletz had written him a prescription for chiropractic treatment, and the Employer was paying for the treatment, but discontinued payment after he allegedly reached maximum medical improvement. *Id.* at 34-35. The Claimant has seen Dr. Deveau at his own expense about six times over the last few months, paying a $25 copayment per visit, amounting to $150 or $175. *Id.*

The Claimant began treatment with Dr. Maletz, an orthopaedic surgeon, around the summer of 1999. *Id.* at 35. The Claimant discussed his neck problems with Dr. Maletz and received medication for this injury. *Id.* at 36. Dr. Maletz also treated the Claimant for severe bilateral carpal tunnel syndrome. *Id.* The Claimant began having problems with his hands about three years ago, experiencing symptoms of aching in both forearms and his hands falling asleep. *Id.* He stated that he would drop things because of loss of sensation in his hands. *Id.* The Claimant had surgery on his right hand on March 30, 2001 and his left hand on May 1, 2001. *Id.* at 36-37. He last worked on December 22, 2000, and at that time, Dr. Maletz was recommending surgery on his hands. *Id.* Dr. Maletz has also treated the Claimant for his knee and lower back problems with medication. *Id.* The Claimant has developed arthritis in both knees gradually over the years, with the right knee a little worse than the left knee. *Id.* at 37-38. Consequently, he cannot kneel down for any length of time, has difficulty getting up from a squat because of pain, and feels achiness in his knees if he stands for prolonged periods. *Id.* at 37-38. The Claimant testified that Dr. Maletz' treatment plan includes fusing the discs in his neck and scraping away something in the C5 and C6 area, but has not yet addressed the knee complaints. *Id.* at 37-39.

The Claimant stated that he sustained a hernia and back injury at work on July 27, 1999. *Id.* He had been working with a crane and sending a pallet up to the boat, and when he bent down to pick up the pallet and put a strap around it, he heard his back crack and felt a pull in his groin. *Id.* at 39. At the time, the Employer's doctors did not find a hernia, and the Claimant returned to work. *Id.* However, the next morning, he went to his doctors and was diagnosed with a hernia. *Id.* He received surgery for the hernia on or about August 10, 1999 by Dr. Montemarano, which was his fourth hernia operation. *Id.* at 39-40. After he healed from the surgery, the Claimant returned to work. *Id.* at 40.

Currently, his back problems are difficulty sitting or standing for prolonged periods. *Id.* at 40. If he has to drive for an hour, he has to get out of the car to stretch and walk around. *Id.* He experiences pain on either side of his spine daily with varying intensity, averaging a 5 or 6 on a scale of 1 to 10. *Id.* at 41. He also experiences daily neck pain with an intensity of 8 or 9 out of 10. *Id.* at 41-42. He experiences headaches 3 or 4 times per week, which can last for two days. *Id.* at 42. The headaches interfere with his ability to engage in his daily activities. *Id.* In the morning, he takes two Vicodin, pain pills, one Celebrex, and one Zanaflex, a muscle relaxant, and after about an hour, he is able to begin his daily routine. *Id.* He also takes two more Vicodin twice a day. *Id.* at 43. The Claimant also takes two types of antidepressant medication, Effexor and Trazodone, which help his ability to sleep. *Id.* The Claimant stated that Dr. Deveau's treatment relieves his headaches and back pain. *Id.* at 41-42.

Dr. Maloney, a psychiatrist in New London, prescribes the antidepressant medications. *Id.* at 43. The Claimant sees Carla Marcus, a social worker, a couple of times per month for therapy, for which he makes a co-payment. *Id.* at 43-44. He began treating with Ms. Marcus in March 2000 because of depression caused by work and dealing with the painful headaches. *Id.* at 44. He stated that the medications have affected his ability to talk normally, which makes it difficult to give a lecture in front of a class. *Id.* at 45.

The Claimant stated that he changed his job to rigging instructor around December of 1999 because of his weakened physical condition. *Id.* For the first six months of the job, he was required to sit at a computer developing lesson plans. *Id.* Afterwards, the job involved primarily standing to lecture to classes, with periodic sitting to relieve pain. *Id.* at 45-46. He also stated that when he sat and typed for prolonged periods, his forearms, back, and neck ached, which forced him to stand periodically to relieve the discomfort. *Id.* In addition, the classes had a demonstration component, and he was required to set up the demonstrations. *Id.* at 47.

By November of 2000, the Claimant was having difficulty walking about a quarter mile to work without having to stop and rest. *Id.* at 48. On December 22, 2000, Dr. Maletz took the Claimant out of work, and he has not worked since that time. *Id.* at 48-49. He has been awarded social security disability benefits, and the Employer has been paying total disability benefits since the Claimant had the right carpal tunnel release at $1,208 every two weeks. *Id.*

The Claimant testified that he had difficulty sleeping through the night until Dr. Maloney increased his Trazodone dosage about a month ago. *Id.* at 50. His ability to concentrate has been affected, resulting in an inability to finish the daily crossword puzzle, which he had previously done with no problem, and losing his train of thought while teaching. *Id.* Also, the Claimant has difficulty driving when he takes both the antidepressants and the pain medication because he cannot stay alert. *Id.*

The Claimant stated that Dr. Maletz recommended a hot tub for home use because of his injuries. *Id.* at 51. He checked for a public facility and found none at the Mystic Community Center or the YMCA branches near him. *Id.*

The Claimant testified that it was too early, about a month post-surgery, to determine if the carpal tunnel releases would relieve his headaches. *Id.* He had felt a little improvement in terms of the pain, numbness, and tingling in his right hand, but he is having a hard time with his left, and dominant, hand, and is unable to open a door using it. *Id.* at 52.

On cross-examination, the Claimant testified that he has a bathtub at home. *Id.* at 52. He also stated that while he has had improvement in the tingling and numbing in his right hand, he still drops things and lacks mobility in his right hand. *Id.* at 53. He planted a vegetable garden this year with help, mowed his lawn with pain and difficulty, and planted four bushes after the holes were dug. *Id.* at 54-55. He has been unable to rake his yard. *Id.* at 54. He testified that he tried to shovel about 8 to 10 inches of snow for about 15 or 20 minutes around February and suffered pain for a couple of days afterwards, requiring treatment with Dr. Deveau. *Id.* at 55-56. He did not finish the shoveling; his girlfriend and her son worked on it and then a friend plowed the driveway. *Id.* at 56.

Dr. Deveau's expenses are paid by the Employer's insurance company, and he currently sees Dr. Deveau on an as-needed basis. *Id.* at 57. The Claimant has had to pay for about 12 to 15 visits with Ms. Marcus and Dr. Maloney for psychiatric treatment at about $10 per visit for a co-payment. *Id.* at 58. The Claimant also testified that he began seeing Ms. Marcus in March 2000 before he went out of work on disability and that he has had psychiatric and depression problems years ago. *Id.* On redirect examination, the Claimant stated that he had been treated for depression about eight years ago. *Id.* He also stated that he currently lives in his first house, which he bought in July. *Id.*

B. Testimony of John Elkins

At the hearing, the Employer called John Elkins, Senior Human Resources Representative, who testified that he conducts workers' compensation fraud and company rules violation investigations. TR2. at 9-10. He stated that Christina Steele, the Employer's workers' compensation representative, asked him to conduct an investigation of the Claimant. *Id.* at 10-11. As background, he was told that the Claimant had pretty much injured all body parts. *Id.* at 11. On February 6, 2001 at approximately 9:05 a.m., Mr. Elkins observed the Claimant at his

residence bending over and shoveling about 10 inches of snow off his sidewalk. *Id.* at 12-16. Mr. Elkins testified that he observed the Claimant by driving by his residence for a total of approximately 40 to 45 minutes and that the Claimant did not appear to be having any trouble shoveling the snow. *Id.* at 15-17. He stated that the Claimant shoveled the entire length of the sidewalk, which was approximately 40 to 50 by 2 feet. *Id.* at 16-17.

Mr. Elkins stated that he initially observed the Claimant for about 10 minutes and then drove to the Employer's south gate area to pick up Judy Currier to verify the Claimant's activities, which caused him to stop his observation for about five minutes. *Id.* at 18-19. He then returned to the Claimant's residence, and he and Ms. Currier observed the Claimant continue to shovel the sidewalk. *Id.* at 19-20. Next, they viewed the Claimant shovel snow from the driver's side of his van, remove snow from the van's roof, and shovel snow from the rear porch of the residence. *Id.* at 17-18. The van was parked in a large parking area in the rear of the residence. *Id.* at 20. Removing the snow from the van's roof required the Claimant to reach above his head and slide the snow forward over the windshield with a broom. *Id.* at 20. The two activities of removing the snow from the van's roof and shoveling the driver's side of the van took approximately 10 minutes. *Id.* at 21. At the time they observed these two activities, Mr. Elkins' vehicle was stationary, providing a clear view of the Claimant. *Id.* at 21-22.

Afterwards, Mr. Elkins drove Ms. Currier back to the Employer's business. *Id.* at 22. He then returned to the Claimant's residence and observed him remove snow from the back porch by pushing the snow off the stairs using one hand on the shovel, which lasted no more than five minutes. *Id.* at 22. Afterwards, the Claimant entered his van and drove the van back and forth in the driveway to apparently pack down the snow. *Id.* at 23. Mr. Elkins stated that he did not observe anyone else with the Claimant on that day. *Id.*

Mr. Elkins next testified that he observed the Claimant again on May 9, 2001 from approximately 12:55 p.m. to 1:40 p.m. from a stationary vehicle, first seeing the Claimant when he was driving to the Employer's Shaw's Cove Facility *Id.* at 24, 27. He saw the Claimant on his hands and knees working in a flowerbed in front of his house twice for about five minutes, at one point resting on one hand and working in the flowerbed with the other hand. *Id.* 25, 28. In addition, the Claimant carried a 5-gallon pail, which appeared full because the Claimant was compensating for the weight, from the rear driveway to the flowerbed, dumped the contents in the flowerbed, and returned to his hands and knees to work in the flowerbed. *Id.* at 25-26. The Claimant also dragged a garden hose from the northside of the house to water the flowerbed and dug around the area of the driveway with a shovel for less then two minutes. *Id.* at 26, 28-29. He also brought a dog out of the house and wrestled with the dog for a short time. *Id.* at 26. Mr. Elkins took approximately 24 photos of the Claimant on that day. *Id.* at 29. Mr. Elkins identified two photographs of the Claimant that he took on that day, which were admitted into evidence as RX 21 and RX 22. *Id.* at 30-32.

Mr. Elkins next testified that he observed the Claimant on July 6, 2001 underneath the hood of his van possibly adding motor oil or windshield washer fluid for approximately five

minutes. *Id.* at 32-33. Mr. Elkins next stated that he believes that the Employer has some kind of hot tub or jacuzzi available for employees across the road from its occupational health center. *Id.* at 33-34.

On cross-examination, Mr. Elkins testified that his primary responsibility is to undertake fraud investigations. *Id.* at 35. In a report to Al Ayers, Mr. Elkins wrote, "We also need to determine if these activities are sufficient enough to controvert his claims or if additional surveillances [sic] are necessary." *Id.* In response, Mr. Elkins was asked to continue the surveillance. *Id.* at 36. He next testified that he was given incorrect information that the Claimant had a doctor's appointment on the day following the initial observation in February. *Id.* He had intended to attend the appointment to take photos, but the appointment was on February 6, 2001, the day of the investigation. *Id.* He stated that he did not talk with the Claimant on or after his investigations regarding the Claimant's activities. *Id.* at 37-39. He also stated that he had no way of determining whether the snow shoveling had caused the Claimant any discomfort. *Id.* Regarding the Claimant's carrying the 5-gallon pail on May 9, 2001, Mr. Elkins stated he had no way of knowing what was in the pail or how much it weighed. *Id.* at 39.

Mr. Elkins next testified that he travels on the Claimant's street two or three times a week. *Id.* at 40. He stated that, on most of those days, the Claimant's van was not in his driveway and that he only observed the Claimant on the days of his investigations. *Id.*

In response to my questioning, Mr. Elkins described the Claimant's activities with his dog, who weighed about 60 pounds. *Id.* at 42-43. The dog was tethered and would jump up, and the Claimant, while standing, would wrestle with the dog, playfully pushing him from hand to hand. *Id.* This activity lasted about two to three minutes. *Id.* at 43. Mr. Elkins clarified that he had observed the Claimant on another occasion near his garden while driving by his residence, but he could not tell what he was doing because the chain link fence obstructed his view. *Id.* at 43-45. Regarding the snow on February 6, 2001, Mr. Elkins stated that there was approximately 10 inches of heavy wet snow, which he based on weather reports because he had not shoveled the snow himself on that day. *Id.* at 45. Regarding the Claimant's snow shoveling, he had shoveled down to the concrete on the sidewalk, but not the dirt on the driveway, removing about eight or eight and a half inches of snow. *Id.* at 47. He removed the snow on the van's roof with a broom by dragging the snow forward from back to front. *Id.* at 48. Regarding the digging with a shovel in May, it lasted about two minutes and the Claimant stepped on the shovel two times. *Id.* at 49. Regarding the July 6 observation, Mr. Elkins testified that the Claimant was carrying what appeared to be a one-quart container, which he surmised was oil. *Id.* at 49-50.

C. Testimony of Judith Currier

Employer's witness, Judith Currier, Human Resource Specialist, testified that she used to work in workers' compensation investigations for many years. *Id.* at 52. She currently manages the Van Pool Program, but still assists Mr. Elkins with investigations because of her experience. *Id.* Ms. Currier testified that, on or about February 6, 2001, she accompanied Mr. Elkins to the

Claimant's house to observe him shoveling snow alongside his house for approximately 20 minutes. *Id.* at 53-55. She stated that they drove around the block in a continuous surveillance, which took less than one minute, with the Claimant coming in and out of sight. *Id.* at 54. Some times, the shoveling was typical, with the Claimant bending with the shovel, picking up snow, and throwing it aside. *Id.* at 54. Other times, she saw the Claimant pushing snow toward the back of the house. *Id.* at 58. The Claimant did not appear to be having any difficulty shoveling. *Id.* at 55. Ms. Currier stated that she observed the Claimant shovel around a vehicle and part of the sidewalk that runs alongside the entire house. *Id.* at 55-56. She stated that she did not observe anyone else with the Claimant. *Id.* at 59.

On cross-examination, Ms. Currier testified that they drove around the block numerous times and stopped on several occasions. *Id.* at 60. She stated that there were times during the 20 minutes when she could not see the Claimant, but that when she could see him, he was shoveling. *Id.* at 61. Ms. Currier also stated that she travels on the Claimant's street and has seen him numerous occasions, but she did not see him doing any particular or physical activity. *Id.* at 62-63.

D. Rebuttal Testimony of the Claimant

On rebuttal, the Claimant testified that he had an appointment with Dr. Maletz on February 6, 2001. TR2. at 66-67. He stated that in order to see Dr. Maletz, he had to remove enough snow from his yard and then drive his van through it, which took about an hour. *Id.* at 67. In preparation for the snow removal, the Claimant took an extra Vicodin that morning. *Id.* at 68. He stated that on the way to Dr. Maletz' office, the roads were difficult to drive on and appeared slushy and hard packed in areas. *Id.* at 68-69. He stated that, at the appointment, he had pain in his hands, neck, back, lower spine, and left shoulder from the shoveling and a headache that continued after the appointment. *Id.* at 69-70.

The Claimant testified that, while he was able to shovel snow to make a doctor's appointment, he would not be able to work at a job with similar physical requirements. *Id.* Regarding the contents of the pail from the May investigation, the Claimant stated that wood chips were in the pail and that the total weight would have been 12 or 15 pounds. *Id.* at 71. He further stated that he can use the garden hose occasionally, but not with his left hand because he cannot squeeze the hose long enough. *Id.* The Claimant testified that he has a seven or eight month old Australian Shepherd. *Id.* at 71-72. Regarding the July investigation, the Claimant stated that he recalled adding a quart of oil to his van. *Id.* at 72. On cross-examination, the Claimant testified that he had the carpal tunnel release surgeries separately on each hand, and he believed that they took place at the end of April or May 2001, but he had difficulty recalling the dates. *Id.* at 74.

In response to my questioning, the Claimant testified that, on February 6, 2001, it was necessary to shovel the sidewalk to reach his van. *Id.* at 75. He also stated that snow next to the house has a tendency to melt and get in the basement. *Id.* at 75-76. He believed that the

investigators had observed him shoveling a 2 by 30 foot concrete strip that runs alongside the house. *Id.* On re-cross examination, the Claimant testified that he did not recall whether anyone was home on February 6, 2001. *Id.* at 78-79.

E. Medical Evidence

The medical evidence begins with office notes and reports from James H. Derby, M.D. from March 1976 through June 1977 and June 9, 1993, regarding a work-related right ankle fracture. CX 16. Due to progressive degenerative ankle joint disease, Dr. Derby stated that the Claimant has a partial permanent disability of 15% as of June 9, 1993 and, with further deterioration, the Claimant may need an ankle joint fusion. CX 16 at 1.

Records from the Employer's Yard Hospital show that the Claimant reported multiple injuries from 1991 to 1999. CX 11. On August 21, 1991, the Claimant reported to the Yard Hospital with a right shoulder strain with some radiation into the right arm. CX11 at 1. The Claimant also complained of a neck sprain/strain on May 18, 1994. *Id.* at 6. On May 22, 1997, the Claimant visited the Yard Hospital and complaining of pain in both knees. *Id.* at 7. Yard Hospital records from July 2, 1998 next document the Claimant's repetitive trauma to both hands, resulting in pain in both hands, wrist numbness, tingling sensations in his fingers and hands, and painful shoulders at night. *Id.* at 9. On July 10, 1998, the Claimant reported neck pain from the repetitive action of looking up frequently throughout the day and sought outside medical treatment through April 23, 1999. *Id.* at 11-15. Records from May 3, 1999 show that the Claimant had an injury on April 28, 1999 to his abdomen and lower back. *Id.* at 16. On July 27, 1999, the Claimant reported an injury to his low back and right groin. *Id.* at 18. On October 18, 1999, the Employer's Medical Department authorized the Claimant to return to work with many restrictions on his physical activities. RX 5 at 1.

In a letter dated August 3, 1998, Anthony G. Alessi, M.D. wrote that he examined the Claimant for bilateral hand numbness and diagnosed severe right hand carpal tunnel syndrome and early symptoms of carpal tunnel syndrome in the left hand with no electrical findings. CX 10. Office notes from John J. Giacchetto, M.D., dated July 9, 1999, reveal the Claimant's report of work injuries to his left shoulder and both groins with continuing pain in both areas. CX 9. The Claimant declined medication at that time, but agreed to return to Dr. Giacchetto if the pain persisted. *Id.*

On September 25, 1998, the Claimant was examined by Kenneth J. Paonessa, M.D., for back and neck problems possibly related to the carpal tunnel syndrome. CX 8; RX 1. Dr. Paonessa wrote that these problems were caused in part by hitting his head several times at work and a prior history of cervical radiculitis that had resolved. CX 8 at 1; RX 1. The Claimant reported increased lower back pain from some of the physical therapy exercises. *Id.* Dr. Paonessa opined that the lower back pain was caused by the exacerbation of a pre-existing condition with the exercises and not from a work-related injury. *Id.* An MRI showed significant cervical disc disease at C5-6 with significant osteophyte ridging and a smaller degree of

osteophyte at C4-5. CX 8 at 3, 5; RX 2. Dr. Paonessa concluded that the neck pain was likely caused by previous workplace injuries and surgery may be needed in conjunction with the carpal tunnel surgery. CX 8 at 5. In a follow-up visit on April 23, 1999, the Claimant stated that his neck pain had lessened after fewer overtime hours. *Id.* at 6. Dr. Paonessa reiterated his opinion that surgery should be considered after the carpal tunnel releases. *Id.* On April 23, 1999, Dr. Paonessa noted on a work restriction form that the Claimant was released to full duty, with no restrictions. RX 4.

Letters from J.P. Zeppieri, M.D., in 1997 and 1998 to the Employer show that the Claimant sought treatment for bilateral carpal tunnel syndrome, neck pain, bilateral knee pain, and lower back pain. CX 7. Regarding the knee problems, as of May 27, 1997, the Claimant repeatedly stated that he experiences pain when he bends the knee and locks it in full extension and has difficulty kneeling. CX 7 at 1. Regarding the neck problems, the Claimant described pain and crepitus when he turns his head from side to side, and he repeated that he experienced some improvement with physical therapy. *Id.* at 2, 5.

Office notes from Christopher D. Deveau, D.C., a chiropractor, show that the Claimant received treatment from August to October 1999, after a workplace injury on July 27, 1999 to his back and groin. CX 6. Initially, the Claimant reported some improvement in his back pain so long as he did not challenge it, as well as alleviation of his neck pain after treating it with ice. CX 6 at 2-4. After swimming and walking, the Claimant stated that his lower back pain increased from mild to moderate. *Id.* at 4-5. On September 13, 1999, the Claimant stated that refinishing a chair on the weekend aggravated his mid-back, requiring him to take muscle relaxants. *Id.* at 5. The records show that the Claimant did not seek treatment with Dr. Deveau from September 20, 1999 to October 12, 1999 while he was receiving physical therapy. *Id.* at 6. On October 12, 1999, Dr. Deveau recommended that the Claimant be re-trained because he could no longer sustain heavy lifting. *Id.* On October 15, 1999, the Claimant reported that since receiving physical therapy, he suffers from daily headaches, which were alleviated by Dr. Deveau's treatment. *Id.* On October 15, 1999, Dr. Deveau recommended that the Claimant return to light duty work through December 24 with lifting restrictions of over 40 lbs. over his waist. *Id.* at 2.

On December 18, 2000, Michael L. Yoel, D.C., reviewed the Claimant's medical records and interviewed Dr. Deveau by telephone. RX 17 at 2. Dr. Yoel concluded that the patient had reached maximum chiropractic benefit and any additional treatment would be maintenance/palliative to keep the patient functioning and would not be medically necessary, specifically as it relates to the July 27, 1999 injury. *Id.* at 3. Dr. Yoel also noted that the Claimant may need to receive treatment for flare-ups because of his physically demanding job, but otherwise treatment would not be curative. *Id.* at 3. On December 21, 2000, Jeanne Brown-Williams, R.N., notified Dr. Deveau of non-certification for any additional chiropractic visits for the lumbar pain as palliative and therefore not medically necessary. RX 17 at 1. On February 7, 2001, Dr. Deveau wrote the Employer that he would treat the Claimant weekly through February to maintain spinal function and pain at a tolerable level. RX 14.

On March 21, 2000, the Claimant was evaluated by Gregory R. Criscuolo, M.D., F.A.C.S., for chronic headaches with recent severe exacerbation. CX 5. Dr. Criscuolo documented an incident where the Claimant awoke with severe head pain and increased neck pain with no focal neurologic disturbance that brought the Claimant to tears. *Id.* The Claimant reported that he received nearly complete relief from treatments with Dr. Deveau. *Id.* Dr. Criscuolo prescribed Celebrex twice a day for long-standing cervical spine disease and headache syndrome. *Id.*

Records from Frank W. Maletz, M.D., show that Claimant had an initial visit on June 20, 2000, where Dr. Maletz reviewed medical records from Drs. Zeppieri, Willetts, Paonessa, Derby, Alessi, Deveau, Criscuolo, and Main. CX 4 at 1. Dr. Maletz observed "marked limitations of cervical motion," mildly tender left shoulder, marked deformity of right humerus, carpal tunnel syndrome, swan lake deformity of the long finger on his right hand, some mobility of the spine, and complaints of prostate problems. *Id.* at 1-2. Dr. Maletz recommended bilateral carpal tunnel surgery and possible cervical discopathy and fusion, and chiropractic treatment twice a week and prescribed daily doses of Zanaflex and Celebrex, and Vicodin as needed. CX 4 at 2. On August 15, 2000, Dr. Maletz noted a 16-pound weight loss and positive results from the medication with flares of pain. CX 4 at 3. He observed the Claimant's arched neck and supple lumbar spine through 50% of the range and recommended continued chiropractic treatment and hot tub use to improve suppleness and ability to sleep. *Id.* On a follow-up visit on November 27, 2000, Dr. Maletz reported continued headaches with positive response to chiropractic treatment and bilateral carpal tunnel and lumbar spine symptoms. CX 4 at 5; RX 7. Dr. Maletz stated that the Claimant's depression was secondary to his dysfunctional status due to his inability to perform light painting, lawn mowing, and low weight lifting related to a new home purchase. *Id.* Also, Dr. Maletz wrote that the depression was caused by Claimant's having to refuse a job that paid $36.00/hour because he could not tolerate the drive. *Id.* In addition, the Claimant told Dr. Maletz that he had to stop and rest during the approximately one-half mile walk to work. *Id.*

On September 21, 2000, Dr. Maletz prescribed a Hot Springs Jetsetter Hot Tub to improve the functional status of the Claimant's lumbar support tissues. CX 3. The Employer agreed to pay for a one-year YMCA membership to enable the Claimant to have hot tub use. RX 9; RX 10.

On December 22, 2000, Dr. Maletz certified that the Claimant was totally temporarily disabled due to his orthopaedic diagnosis of cervical and lumbar discopathy, bilateral carpal tunnel syndrome, and bilateral knee problems. CX 2. On February 6, 2001, Dr. Maletz wrote that he reviewed Dr. Willetts' report of January 10, 2001 and a report by Lori Wall, Ergonomics Specialist, describing the trade instructor job, performed on February 1, 2001. CX 1. Ms. Wall's report provides that the job entails sitting for 2.5 hours, standing for 4.5 hours, occasional grasping, pinching, keying, push/pull, bending, scooping, squatting and crouching. *Id.* Dr. Maletz maintained his original recommendation that the Claimant is totally disabled, is unable to perform any of these tasks, and requires CTS surgery. *Id.* He stated that his examination revealed the Claimant's clear discomfort. *Id.* He added that the Claimant continued to report

severe hand/arm problems and inability to tolerate an hour's worth of driving due to pain in his cervical and lower lumbar spine, particularly in the inclement weather with bumpy roads. *Id.*

The parties deposed Dr. Maletz on June 11, 2001. He testified that he graduated medical school in 1978 and was board-certified in orthopedics in 1986. CX 20 at 5-6. Dr. Maletz stated that he first examined the Claimant on June 20, 2000, and the Claimant had very limited motion in his cervical spine, a deformity of his distal right humerus, extremely positive nerve compression signs about both wrists, limited range of motion, but no neurologic deficit in his lumbar spine, and historical pain in the knees. *Id.* at 7-8. After reviewing x-rays, Dr. Maletz prescribed medications for arthritis. *Id.* at 8. He stated that he prescribed chiropractic treatment on June 20, 2000 because the Claimant had a history with Dr. Deveau and to improve his limited neck motion, and he had previously worked with and respected Dr. Deveau. *Id.* at 9. There was no current prescription for chiropractic treatment because the Claimant was recovering from his carpal tunnel surgeries. *Id.* Dr. Maletz confirmed his June 20, 2000 recommendation for carpal tunnel surgeries and possible neck surgery. *Id.* at 10. Dr. Maletz continues to treat the Claimant approximately monthly and observed progressive dysfunctionality in both hands and neck, worsening headaches, restless sleeping, and depressive symptoms that were at least partly due to the sleep disorder and pain. *Id.* at 10-11.

Dr. Maletz stated that Dr. Roy Main, the Claimant's long-time primary care physician, prescribed antidepressant medication and referred him to a psychiatrist. *Id.* at 11. While Dr. Maletz testified that he did not refer the Claimant to a psychiatrist, he would have done so if requested. *Id.* at 12. He further stated that psychiatric treatment and medication was not his area of expertise. *Id.* Dr. Maletz described the Claimant's mood on November 27, 2000 as frustrated. *Id.* Dr. Maletz stated that he believed the Claimant had an excellent work ethic based on his statements of wanting to reach a functional status, the performance of home projects, and his complete compliance with therapeutic treatment. *Id.* at 13. By the end of December 2000, Dr. Maletz described the Claimant as "in a downward spiral" and his "deterioration was quite clear," and he then took the Claimant out of work *Id.* at 13-14. Having recommended carpal tunnel surgery since June 2000, Dr. Maletz filled out the booking slip on February 21, 2001 and performed the right-hand surgery on March 30, 2001 and the left-hand surgery on May 1, 2001. *Id.* at 14-15. Dr. Maletz anticipated the next step in treating the Claimant would be neck surgery on two levels to treat the neck muscle tension and the headaches, which would likely be performed by neurosurgical/orthopedical team because Dr. Maletz does not perform neck surgery. *Id.* at 15-16.

Dr. Maletz next testified that the Claimant would be incapable of performing the rigging instructor job, assuming that it involved prolonged standing and lecturing and minimal heavy lifting, pushing, or pulling. *Id.* at 16. Dr. Maletz further stated that the Claimant was not capable of performing any type of work on a regular or sustained basis and would never be able to return to his work as a rigger. *Id.*

Dr. Maletz stated that he recommended a hob tub for home use months ago for four reasons: deep moisturized heating is the best muscle relaxant to relieve low grade muscle tightness; physical therapy would be too inconvenient to receive full therapeutic use while he is working; an insufficient number of available hot tubs; and high physical therapy bills. *Id.* at 17. Furthermore, to receive full therapeutic effect, heating should be done once or twice a day, and the Claimant would need to use the hot tub on a long-term basis. *Id.* In addition, this use would hopefully reduce the need for muscle relaxants, and with reduced pain medicine and muscle relaxants, in addition to neck surgery, the Claimant may be able to return to the instructor position. *Id.* at 17-18. However, the current medications would make it difficult for the Claimant to teach. *Id.* at 18. Dr. Maletz also stated that he disagreed with Dr. Willetts' assessment that shower or tub use would be similarly beneficial because it would not allow the Claimant to relax his neck and would not use jetted water massage and moisturized deep heat, which is the best way to treat total spine disease. *Id.* at 19.

On cross-examination, Dr. Maletz testified that he had prescribed a hot tub for "a fair number" of his patients and that the cost ranges from $3,500 to $5,000 per tub with minimal maintenance, possibly substantial electrical, and unknown installation costs. *Id.* at 19-20. Dr. Maletz had not previously detailed the specific cost-effectiveness of hot tub use in terms of reduced medication and physical therapy to the Employer. *Id.* at 20-21.

Dr. Maletz next stated that his knowledge of the rigging instructor job was that it was a full-time, 40-hour per week job that involved standing in a classroom for parts of the day and teaching rigging. He understood rigging practices from reading the federal government guidelines. *Id.* at 21. Dr. Maletz stated that the Claimant was not capable of working any full-time job, but it was possible that he could work some part-time jobs. *Id.* at 22. However, he was currently temporarily totally disabled because of the recovery time from the carpal tunnel surgery, the need for neck surgery, and the substantial pain medications. *Id.* at 22-23. Dr. Maletz stated that the Claimant should be nearly recovered from his carpal tunnel surgeries and maximum recovery is typically reached in eight weeks to three months for bilateral surgery. *Id.* at 23. He characterized the Claimant's hand surgery as the first step in his treatment with neck surgery as the next step and that it is premature to identify restrictions or identify maximum medical or surgical improvement. *Id.* at 24-25.

After reviewing the summary of medications (RX 15), Dr. Maletz stated that all of the medications in Summary A are related to his workplace injuries and, with respect to Summary B, the Clonazepam could be related to work due to the frustration over his pain causing depressive symptoms. *Id.* at 25. The Promethazine, Amoxil, and Nasarel would not be work-related, and the Ziac, Hydrochlorothiazide and Atenolol would be related to the workplace injuries if the hypertension is related to the stress from his workplace disabilities; however, Dr. Maletz stated that this was not his area of expertise. *Id.* at 25-26. Regarding the Viagra, Dr. Maletz stated that it was premature to determine the relationship to workplace injuries until after the cervical surgery. *Id.* at 26. If the Claimant experiences the return of sexual function after the neck surgery, it would clearly be related to the work injuries. *Id.*

On redirect examination, Dr. Maletz stated that he knew that the Claimant had been prescribed medication for hypertension during the time of his treatment with him, which would indicate the hypertension had been difficult to manage. *Id.* at 27. Dr. Maletz stated that the headaches would also be related to the workplace injuries, similar to the Viagra, if the neck surgery relieves them. *Id.* Also, the headaches may be work-related because the muscle tension worsens throughout the workday and have historically been relieved with chiropractic treatment and deep heating. *Id.* at 28.

The post-hearing medical evidence shows that on August 27, 2001, Dr. Maletz observed serious neck problems with shoulder pain and headaches, satisfactory results on the left carpal tunnel surgery, resolution of the right carpal tunnel, and achy knees. RX 23. An MRI scan dated July 9, 2001 showed degenerative change, but no further substantive deterioration, and Dr. Maletz indicated this scan was positive and that conservative care should yield continued improvements. *Id.* He recommended continuing physical therapies and Fioricet for the headaches. *Id.* After a follow-up visit on October 24, 2001, Dr. Maletz related Dr. Deveau's observation that little progress had been made on treating the neck problems. CX 23. Dr. Maletz referred the Claimant to Dr. Patrick Doherty for assessment of two level discectomy to remove the discogenic osteophytic complexes in his cervical spine and possible fusion. *Id.* Dr. Maletz noted the carpal tunnel surgeries are "well-healed" and "satisfactorily resolved" and both knees were still painful. *Id.* Records from Dr. Doherty show that he examined the Claimant on November 16, 2001 and observed limited neck range of motion and increased pain with turning his head to the left and raising his left arm. CX 22. Dr. Doherty reviewed the recent MRI, which showed significant degenerative disc disease at C4/5 and substantially worse at C5/6, and C6/7. *Id.* He recommended cervical discectomy and fusion at C5/6 and C6/7. *Id.*

On December 11, 1998, Philo F. Willetts Jr., M.D., conducted an independent medical examination of the Claimant for his neck and left shoulder complaints related to the July 9, 1998 injury and carpal tunnel syndrome and reviewed the medical records. RX 3. Dr. Willetts stated that the Claimant is not disabled as a result of the injury on July 9, 1998 because he continues to work. *Id.* at 6. He emphasized that the Claimant was not disabled and does not require any restrictions for light work. *Id.* Furthermore, Dr. Willetts wrote that the Claimant reached maximum medical improvement on the date of his injury, July 9, 1998. *Id.* at 7.

Dr. Willetts conducted a second independent medical examination on December 13, 1999 related to the July 27, 1999 injury and a review of updated medical records. RX 6. Dr. Willetts opined that, at the time of the examination, the Claimant was 5% whole person or 7% of the lumbar spine partially disabled from the low back injury on July 27, 1999. *Id.* at 6-7. He further stated that as the Claimant was still improving, his lumbar spine impairment may range from 0 to 7% in the future. *Id.* at 7. With respect to the back injury, Dr. Willetts recommended work restrictions of lifting no more than 40 pounds for two weeks and then return to normal duty work. *Id.* at 6. Dr. Willetts deferred to Dr. Montemarano, the hernia surgeon, regarding restrictions as a result of the hernia repair. *Id.* at 6. He wrote that the Claimant would reach maximum medical improvement in three months. *Id.* at 7. Regarding chiropractic treatment, Dr. Willetts wrote that

chiropractic, physical therapy, surgery, or other modalities were no longer necessary for the back and that home exercise and walking would be the best treatment. *Id.* at 8.

Dr. Willetts next examined the Claimant on January 10, 2001 and conducted a comprehensive review of medical records. RX 8. Dr. Willetts wrote that the Claimant is partially disabled due to his back, neck, and hand complaints. RX 8 at 17. Concluding that the Claimant could not perform his job duties as a rigger, Dr. Willetts restricted his work activities from climbing ladders, handling vibrational tools, doing forceful chain hoists, or heavy lifting. *Id.* Dr. Willetts considered the chiropractic treatment reasonable given the stated significant relief achieved. *Id.* Dr. Willetts stated that the hot tub would not cure or rehabilitate the Claimant's injuries, as it is palliative and not curative. *Id.* Dr. Willetts also determined that the carpal tunnel releases and possible cervical fusion, if pain persisted, would be beneficial. *Id.* He set the following dates for maximum medical improvement: July 9, 1998 for the cervical spine; March 1, 2000 for the lumbar spine; and, one-year post-surgery for the carpal tunnel releases. *Id.* at 18.

Using the American Medical Association Guides, Fifth Edition, Dr. Willetts concluded that the Claimant had a 9% permanent partial disability of the whole person due to the cervical injury and 10% permanent partial physical impairment of the cervical spine, which was apportioned 5% preexistent and 5% related to the July 9, 1998 injury. *Id.* at 17-18. In addition, Dr. Willetts reported that the Claimant had a 5% permanent partial disability of the whole person due to the lumbar spine injury, equivalent to a 7% permanent partial impairment of the lumbar spine. *Id.* at 19. He could not rate the hands impairment because they had not reached maximum medical improvement due to the impending surgery. *Id.* Dr. Willetts reported the Claimant's current activities as one-half hour daily housework, three hours daily walking, shopping and running errands one hour daily, watching television two hours daily, reading one hour daily, and lying down seven hours daily. *Id.* at 20. He noted that recent painting and refurbishing activities on his new home had worsened his symptoms. *Id.*

The parties deposed Dr. Willetts on July 21, 2001, where he testified that he had been a licensed physician since 1970, has been practicing orthopedic surgery since 1978, and has been board-certified in orthopedic surgery for 22 years. RX 20 at 4. He has treated many patients with similar medical problems as the Claimant since 1978. *Id.* at 5. Upon subsequent review of his January 10, 2001 report, Dr. Willetts corrected his rating from 10% to 11% permanent partial disability for cervical spine, apportioning 5% preexisting and 6% resulting from the July 9, 1998 injury.[4] *Id.* at 8. Dr. Willetts testified that he reviewed the trial exhibits in this case, but not the transcript, and opined that recovery for the carpal tunnel surgeries would be six weeks to

[4] By cover letter filed on June 27, 2001, Employer's counsel informed this Court of a correction to Dr. Willetts' deposition that he should have assigned the Claimant an 11% permanent partial physical impairment of the cervical spine, rather than the 10% impairment he stated in the deposition. However, I note that Dr. Willetts did indeed assign an 11% permanent partial disability of the cervical spine in his deposition and acknowledge the confirmation of the correct impairment rating.

preoperative condition absent complications. *Id.* at 8-9. While he had not seen the Claimant since his surgeries, he had previously examined his hands. *Id.* at 10. Based on the neck problem, Dr. Willetts stated the Claimant should avoid climbing ladders, using forceful chain hoists, and lifting over 20 pounds. *Id.* Regarding his upper extremity neuropathies, the Claimant should avoid using vibrational tools and rapid, forceful, repetitive, vigorous hand motions. *Id.* Dr. Willetts stated that the Claimant could work despite continued headaches and neck and back pain assuming the carpal tunnel surgeries were performed as documented in the medical records. *Id.* at 10-11. This opinion was based on three examinations of the Claimant, most recently in January of 2001, where the Claimant showed his ability to perform some gardening and computing and the intellectual ability gathered from previous work at Burroughs Corporation, PowerPoint knowledge, and some college courses to perform some non-exertional jobs. *Id.* at 11. Consequently, he concluded that the Claimant is partially, not totally, disabled. *Id.* Dr. Willetts testified that any future neck surgery would not alter his opinion, stating that any neck surgery would result in temporary total disability for a recovery period of approximately three months. *Id.* at 11-12.

After reviewing the physical task analysis for the instructor job (RX 12), Dr. Willetts testified that as of the January 10, 2001 examination, the Claimant was capable of performing the job duties with the exception of lifting and carrying up to 25 pounds, which could be reasonably accommodated. *Id.* at 12-13. That examination indicated he could grasp, pinch, use a keyboard, reach overhead, bend, crouch, stoop, and the subsequent medical records review did not indicate otherwise. *Id.* at 13-14. The Claimant's carpal tunnel surgeries did not change this opinion as the instructor primarily uses his hands for PowerPoint lectures, which should have already been completed. *Id.* Dr. Willetts stated that six weeks after the carpal tunnel surgeries, the Claimant could click a mouse button to show PowerPoint slides in a lecture setting and it would not be unusual for the Claimant to perform this job functions only a few days after the surgery. *Id.* at 14-15. Furthermore, he testified that the Claimant could perform the instructor position in a full-time capacity. *Id.* at 15.

After reviewing Ms. Delf's vocational evaluation and labor market survey (RX 16), Dr. Willetts stated that the Claimant could perform the jobs listed in the evaluation and that they were well within his physical capabilities. *Id.* at 15-16. This opinion also takes into account the carpal tunnel surgeries as the jobs do not require any real physical exertion of the hands. *Id.* at 16. Regarding the report by the vocational expert Paul Murgo, Dr. Willetts disagreed with the limitations imputed to him by Mr. Murgo regarding the neck pain and upper extremity neuropathy. *Id.* at 19. He stated that he has not placed any formal restrictions on the Claimant because of the neck pain, and the restrictions imputed by Mr. Murgo regarding the hand/arm condition are incorrect. *Id.* at 19-20. Furthermore, Dr. Willetts stated that Mr. Murgo mis-characterized Dr. Maletz' February 6, 2001 report as providing considerable detail, instead of conclusory statements, regarding the functional limitations. *Id.* at 20. Also, Dr. Willetts believed that Mr. Murgo only performed a cursory review of the reports, failing to take into account his tests of the Claimant's strength and pinching ability. *Id.* at 20-21. In addition, he said that Mr. Murgo did not consider the Claimant's experience at Burroughs Corporation and the full scope of

his college courses. *Id.* at 21-22. Dr. Willetts does agree with Mr. Murgo's criticism of his classification of the Claimant's available work as "sedentary" and amended his classification to "primarily sedentary" meaning that the Claimant could probably lift more than 10 pounds. *Id.* at 22.

Regarding summary of medications (RX 15), Dr. Willetts stated, "[i]n Section B, there's no single medication that, in my opinion, is clearly proven to be for his work-related residual." *Id.* at 17. He stated that Imitrex is for migraine headaches, not cervical spine disease. *Id.* He also testified that there has been no establishment of sexual dysfunction related to the workplace injuries, and high blood pressure is not caused by his type of injuries, usually of unknown cause or ten percent from an anatomical cause. *Id.* Furthermore, he stated that a hot tub would not cure, rehabilitate, or address in any way the Claimant's work-related injuries. *Id.* at 18. As an alternative to the hot tub treatment, Dr. Willetts suggested a shower seat, hydrocollator, or a deep tub bath. *Id.* at 19.

By letter dated May 7, 2001 to Claimant's attorney, Carla A. Marcus, LCSW, Clinician, wrote that the Claimant has been in counseling with her since March 13, 2000 and, prior to that, for eight sessions through the employee assistance program. CX 13. She stated that, over the treatment time, the Claimant appeared "very depressed," talking at length about his daily pain and medical problems and his inability to engage in certain activities because of the pain. *Id.* The Claimant had reported to her that these problems were work-related, and his depression increased when he was unable to work with resultant financial problems. *Id.* The Claimant had told her that these problems manifested in feelings of uselessness and hopelessness and difficulty in his relationship with his significant other. *Id.* He was also upset because he considered himself an honest person and did not feel that the Employer was reciprocating that treatment. *Id.* Ms. Marcus stated that she referred the Claimant to Dr. Martin Maloney, a psychiatrist, for medication evaluation, who prescribed Effexor and Klonipin. *Id.* Subsequently, Dr. Maloney increased the Effexor and added Trazodone to help alleviate sleep problems. *Id.*

On March 27, 2001, Nancy G. Matais, R.N., Case Manager, conducted a drug review, summarizing the drugs related directly to the July 27, 1999 injury as Vicodin, Fexeril, Tylenol with codeine, Celebrex, and Zanaflex. RX 15. She recommended that the following drugs were not part of the Employer's payment responsibility: Clonazepam, Phenergen with codeine, Imitrex, Ziac, Amoxil, Nasarel, Hydrochlorothyazide, Atenolol, and Viagra. *Id.*

Vocational Evidence

The Employer introduced a vocational evaluation and labor market survey conducted by Susan Delf, M.Ed., C.R.C., Vocational Consultant, dated May 14, 2001. RX 16. Ms. Delf met with the Claimant and reviewed Dr. Willetts' medical report, dated January 10, 2001, Dr. Maletz' reports from June 20, 2000 and February 6, 2001, and Dr. Criscuolo's report of March 21, 2000. *Id.* at 1-3. Ms. Delf noted that the Claimant was cooperative in the interview and expressed complaints of painful headaches and difficulty driving because of his medications. *Id.* at 1. He

offered no ideas about alternative employment and was focused primarily on his medical issues at that time, expressing disappointment over not being able to do much yard work and home maintenance. *Id.* at 1-2. She acknowledged his current medical status and education, including his 12 college-level credits toward an associate's degree. *Id.* at 4. In addition, Ms. Delf summarized his work history, including eight years with Burroughs Corporation, a printing company, working in the stockroom and in production planning, almost 24 years as a rigger for the Employer, and one year as a rigging instructor. *Id.* at 5. His transferable skills include teaching, managing, and computing with an advanced application, PowerPoint. *Id.* at 6. Ms. Delf then identified seven jobs based on a labor market survey conducted during the week of May 21, 2001:

(1) Security at Pinkerton Security, East Hartford, Connecticut, in the Norwich and New London area with varied shifts, requiring sitting/standing as needed, paying at $8.50 an hour and up;

(2) Front Desk Clerk at Groton Inn and Suites, Groton, Connecticut, with varied part-time shifts, at $10.00 an hour;

(3) Companion at Interim Health Care in Norwich, Connecticut at various part-time hours and paying $8.00 per hour and up;

(4) Shuttle Dispatcher at Foxwoods Casino, Pawcatuck, Connecticut, with full-time day and evening positions at $8.12 an hour to start, and additional security and bus greeter positions;

(5) Customer Service at Secor Saab Volvo, in New London, Connecticut, full-time day shift at approximately $9.00 per hour;

(6) Overnight Monitor at The Elms Retirement Residence, Westerly Rhode Island, 11:00 p.m. to 7:00 a.m. shift at $8.00 per hour; and,

(7) Job Coach at Seabird Enterprises, Groton, Connecticut, with varied part-time and full-time shifts, involving supervision of clients at community-based job sites, at up to $12.00 per hour to start.

Id. at 6-8. Ms. Delf stated that all the positions were within the geographic area of Groton, Connecticut. *Id.* at 8.

The Claimant deposed Ms. Delf on June 14, 2001. She testified that she has been a vocational counselor for eleven years. CX 19 at 4. In reference to the Wide Range Achievement Test, Ms. Delf stated that the Claimant has high school-level math and spelling skills and post-high school reading abilities. *Id.* at 5. Ms. Delf testified that she considered Dr. Maletz' opinion that the Claimant was temporarily totally disabled and stated her analysis was based on a

projection into the future when the Claimant was recovered from carpal tunnel surgery. *Id.* at 18. Her report was based on Dr. Maletz' opinion in addition to other medical reports that he had some work capacity. *Id.* at 20. On the date of the vocational interview, May 11, 2001, Ms. Delf stated that the Claimant could not work because of his recent surgery, which could extend to the possible cervical fusion surgery. *Id.* at 22.

The Claimant offered a Vocational Assessment Employability Evaluation conducted by Paul F. Murgo, M.Ed., dated April 26, 2001. CX 12. Mr. Murgo met with the Claimant on April 18, 2001, administered vocational testing for academic skills and cognitive ability, and reviewed medical records from Drs. Willetts, Maletz, Criscuolo, Deveau, Zeppieri, Paonessa, Giacchetto, and Alessi. CX 12 at 1-2. Mr. Murgo reported that the Claimant "maintained appropriate eye contact, demonstrated average verbal skills, and shared information without any hesitation, reluctance, or guarding." *Id.* at 1. The Claimant scored in the Average range for testing in reading, spelling, and arithmetic under the Wide Range Achievement Test. *Id.* at 2-3. On the Wonderlic Personality Test, the Claimant scored in the 27th percentile, which is in the bottom 25% of the population. *Id.* at 3. Mr. Murgo inferred from Dr. Willetts' reports that the Claimant was only capable of performing "sedentary" work, which is defined by the U.S. Department of Labor as involving six to eight hours per day sitting and no lifting over 10 pounds. *Id.* at 4. Given the instructor job analysis of 4 ½ hours standing, 2 ½ hours sitting, and occasional grasping, pinching and keying, the Claimant was incapable of performing the instructor job. *Id.* Bearing in mind the difficulty in obtaining employment at an advanced age of 55 to 59, Mr. Murgo concluded that the Claimant's skills as a rigger and rigging instructor would not be transferable to a lighter, less physically demanding environment. *Id.* at 4-5.

On June 18, 2001, the Claimant deposed Mr. Murgo, who testified that he has been a vocational rehabilitation counselor for twenty-eight years. CX 18 at 4-5. Mr. Murgo stated that, at the time of the interview on April 18, 2001, there was no way to know what the Claimant's functional capabilities would be after he finishes his medical treatment. *Id.* at 15. Mr. Murgo expressed that the Claimant had a strong work ethic and was proud of his work history. *Id.* at 18. Regarding the Claimant's employment prior to his hire date with the Employer in 1976, Mr. Murgo testified that generally the relevant history is fifteen years, as accepted by the federal government. *Id.* at 20. Furthermore, Mr. Murgo stated that the Claimant was not capable of performing any occupations and from a vocational perspective, he could not determine when the Claimant would become employable. *Id.* at 21.

On cross-examination, Mr. Murgo testified that he did not take any employment history prior to the Claimant's work with the Employer. *Id.* Regarding his knowledge of the instructor position, Mr. Murgo stated that it involved developing and teaching lesson plans, demonstrating proper rigging procedure, and using PowerPoint to create and show slides as a visual aid to instruction. *Id.* at 23. Mr. Murgo acknowledged that it was possible for a person to deliberately perform poorly on his standardized tests, but in his experience, that was not likely. *Id.* at 24-25. He believed the Claimant was performing accurately because he scored similarly on both tests and consistent with his education level. *Id.* at 26-27. He stated that he did not review any grade

reports or transcripts or know the number of college-level courses completed or how many classes or students the Claimant taught. *Id.* at 25.

Based on the Employer's physical task analysis, the rigging instructor job involved 2.5 hours sitting, 4.5 hours standing, and 1.0 hours walking per day. RX 11 at 2. Also, the job required occasional bending/stooping, squatting/crouching, climbing stairs, reaching overhead, pushing/pulling, uneven work surfaces, twisting, awkward positions, grasping, pinching, keying, lifting over 25 pounds, carrying over 25 pounds, reaching over and at shoulder height, and frequent reaching under shoulder height. *Id.* The job responsibilities are to develop, update, and obtain approval for lesson material, prepare for instruction, instruct classes, insure proper use of demonstration equipment, monitor attendance, and provide course completion information. RX 13 at 1. The lifting and handling requirements involve primarily guiding the students to perform "hands on" training of equipment in a lab. *Id.* Physical restrictions may be accommodated to exclude specific tasks or work part-time within the training department's needs. *Id.* at 2.

The Employer offered the Claimant's deposition, which took place on April 27, 2001, to show the Claimant's work capabilities and the job duties and requirements of the rigging instructor position. RX 19. The Claimant stated that he took college-level courses leading toward an associate's degree in shipbuilding and marine technology, including one course each in English and Psychology before 1981, receiving an A or B grade in each of the courses. *Id.* at 7-8. In his position as rigging instructor, he updated the lesson plans and material for the required refresher course for riggers and created a PowerPoint presentation with over 200 slides to show to the classes. *Id.* at 11, 15-16. This involved reviewing lessons plans from at least 1982 or 1983 and updating them with current policy regarding new boats and safety and crane issues. *Id.* at 15. Teaching the course to riggers required standing for six out of seven and half to eight hours, sitting down periodically to alleviate discomfort. *Id.* at 15-16, 31. Teaching the course to other trades took less time because there was no need to teach the full lesson. *Id.* The Claimant taught this course to approximately 60 to 65 groups of 12 to 15 people three times per week. *Id.* at 22.

The Claimant testified that the job also involved a practical application component to test the students' use of cranes, mock-ups, and the hook up of material. *Id.* at 11. The Claimant was required to set up and put away the demonstration equipment, which involved hanging chain-falls and taking equipment out of the gear box. *Id.* at 23-24. He would typically have help with these tasks. *Id.* at 24. In addition, he had to set up the PowerPoint projector and tower on the rolling table. *Id.* at 24. The other physical requirements of the job were walking around the yard to meet with other departments to update the lesson plans and sitting at safety meetings for about three hours. *Id.* at 25. At the safety meetings, the Claimant had to stand up every hour to relieve his discomfort. *Id.* at 25-26.

The Claimant stated that he took a course at the Employer's facility to learn PowerPoint and a week-long course in public speaking. *Id.* at 17, 31. He received a commendation letter for the PowerPoint presentation from the Employer, and a supervisor expressed that it was the best presentation he had seen in twenty years. *Id.* The Claimant next testified that he had an E-

machine computer in his home and used it twice per week for about ten to fifteen minutes per session for e-mail and internet use and occasional word processing. *Id.* at 19-20.

In the instructor position, he received an immediate 75 cent increase in salary. *Id.* at 13. During 1998 and 1999, the Claimant worked a lot of overtime because of a shortage of riggers and his medications. *Id.* at 14. After becoming an instructor, he worked practically no overtime, but he was still eligible for rigging overtime work. *Id.* However, this overtime work decreased substantially, and he was not physically able to do it. Id.

On April 30, 2001, the Social Security Administration issued a Notice of Award that the Claimant was entitled to monthly disability benefits, offset by his workers' compensation benefits. CX 15. The Employer paid the Claimant a compensation rate of $658.58 based on an average weekly wage of $987.87 starting on July 28, 1999 due to an accident on July 27, 1999. CX 14

IV. Findings of Fact and Conclusions of Law

The parties have, as discussed above, stipulated that the Claimant sustained multiple injuries from 1991 to 1999 that arose out of and in the course of his employment with the Employer, which have resulted in disability. In dispute is the nature and extent of the Claimant's disability in terms of whether he has any residual wage-earning capacity and whether the Claimant is entitled to continuing medical care for chiropractic treatment with Dr. Deveau, psychiatric treatment for anxiety and depression, medications for headaches, high blood pressure, anxiety, and depression, and a hot tub for home use, under section 7 of the Act.

The Claimant seeks an award of continuing temporary total disability benefits beginning on December 22, 2000 when he left work due to neck, back, hand, and knee problems caused by multiple workplace injuries. TR1. at 8. The Employer refused to pay benefits until March 30, 2001, the date of the first carpal tunnel release surgery, and based payment on the carpal tunnel claim. *Id.* at 9. The Claimant argues that the July 27, 1999 back and groin injury is a significant factor in the Claimant's condition and the appropriate injury for which compensation should be paid. *Id.* Regarding the medical care disputes, the Claimant asserts that the headaches are caused in significant part by the cervical disc disease and are work-related. *Id.* In addition, the Claimant contends that his need for psychiatric treatment is work-related, and chiropractic treatment and a hot tub for home use are reasonable and necessary medical expenses covered by the Act. *Id.* at 10.

In response, the Employer states that it authorized the bilateral carpal tunnel surgeries as a result of and in preparation for the informal conference in February 2001 and urges this Court not to penalize the Employer because of the surgeries. TR1. at 18; Emp. Br. at 1-3. In addition, the Employer offers a report from a vocational specialist, identifying various positions as suitable and

within the Claimant's training and physical restrictions. TR1. at 18; Emp. Br. at 3-9.[5] Regarding the medical care issues, the Employer asserts that the hot tub is not necessary and instead offers the Claimant a one-year membership to a club with a hot tub to meet his needs. *Id.* Lastly, the Employer argues that chiropractic care is not medically necessary, the need for psychological counseling is unrelated to his workplace injuries, and that various medications are similarly unrelated to the injuries sustained at the Employer's facility. Emp. Br. at 10-12.

A. Nature and Extent of the Claimant's Disability

In a claim for disability compensation that is not based on the schedule of losses in section 8(c) of the Act, a claimant has the initial burden of establishing that he cannot return to his usual employment. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45, 48 (1997); *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury, even if he was performing those duties for only four months prior to the injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). In addition, the Court of Appeals for the District of Columbia has held that, in determining whether an employee can perform his pre-injury job, the judge must address economic, as well as medical, considerations and determine whether the pre-injury job is still available. *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 799, 21 BRBS 45 (CRT) (D.C. Cir. 1988). In its brief, the Employer admits that the rigging instructor position is no longer available and does not argue that the Claimant is capable of performing the rigging instructor job, relying instead on its vocational expert's opinion concerning suitable alternate employment and the Claimant's wage earning capacity. Consequently, I find that the Claimant is not capable of returning to his usual employment.

Since the Claimant has established that he is unable to return to his former employment because of work-related injuries, the burden shifts to the Employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981) (*Gulfwide Stevedores*); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). If the Employer does not carry this burden, the Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano*, 538 F.2d 933, 935-36 (2d Cir. 1976); *Rogers Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986). To satisfy its evidentiary burden, "the employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could

[5] In its opening statement at the hearing, the Employer argued that the Claimant is capable of performing his prior or "usual" employment, the light-duty rigging instructor job. TR1. at 18-19. However, in its post-hearing brief, the Employer candidly informed this Court that the rigging instructor job is no longer available; therefore, it relies on the alternative suitable employment identified by its vocational expert, Ms. Delf, concerning the claimant's wage earning capacity. Emp. Br. at 8 n.5.

compete for and realistically and likely secure." *Palombo*, at 74, citing *Gulfwide Stevedores* at 1042-43. For job opportunities to be realistic, the employer must establish their precise nature, terms, and availability. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988); *Price v. Dravo Corp.*, 20 BRBS 94, 98 (1987); *Rieche v. Tracor Marine*, 16 BRBS 272, 274 (1984). Once an employer satisfies its burden, a claimant may rebut the showing of suitable alternative employment by establishing "that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, at 74, quoting *Gulfwide Stevedores* at 1043.

In her May 14, 2001 labor market survey, Ms. Delf, the Employer's vocational expert, identified seven employers in the Claimant's geographic area that had job openings as a security officer, hotel front desk clerk, companion, shuttle dispatcher, car dealership customer service representative, overnight monitor, and job coach. In her deposition on June 14, 2001, Ms. Delf stated that her report was based on Dr. Maletz' opinion that the Claimant was temporarily totally disabled and other medical opinions that he had some work capacity. Her report accounted for the Claimant's medical treatment plan, projecting the results of the labor market survey into the future when the Claimant would be recovered from the carpal tunnel surgeries and any possible cervical fusion surgery.

In his deposition on June 11, 2001, Dr. Maletz, the Claimant's treating physician, testified that the Claimant was not capable of performing any kind of regular or sustained work because of his recovery from carpal tunnel surgery, need for neck surgery, and substantial pain medications. Dr. Maletz explained that the current medications made it difficult for the Claimant to teach. He stated that, by the end of December 2000, the Claimant's condition had deteriorated to the point where he had to be taken out of work. His medical treatment plan involved the carpal tunnel surgeries, possible neck surgery, and moisturized deep heat from daily hot tub use to alleviate the Claimant's headaches and neck and low back tension. Dr. Maletz intended this treatment to result in the reduction of the Claimant's need for pain medication and muscle relaxants, enabling him to return to some kind of gainful employment in the future.

The Employer's physician, Dr. Willetts, offers a contrary opinion that the Claimant is partially disabled and capable of performing "primarily sedentary" jobs, including those identified by Ms. Delf in her labor market survey. He reasoned that the jobs required no real physical exertion of the hands, could be performed despite the headaches and back pain, and were within the physical restrictions he imposed due to the neck condition, which were to avoid climbing ladders, using forceful chain hoists, and lifting over 20 pounds. Dr. Willetts based this opinion on three physical examinations of the Claimant, the most recent of which was on January 10, 2001, where the Claimant demonstrated positive results for grasping, pinching, keying, reaching overhead, bending, crouching and stooping; the Claimant's ability to do some gardening and computing; the Claimant's intellectual capabilities; and, a review of the updated medical records. Dr. Willetts offered no opinion on the effect of the Claimant's pain and muscle relaxant medications on his ability to work or drive.

After a careful review of the two opposing medical opinions, I have decided to credit Dr. Maletz' opinion over that of Dr. Willetts and find that, presently, the Claimant cannot perform any work, including the jobs identified by Ms. Delf in her labor market survey. While both physicians have similar qualifications including board-certification in orthopedics, Dr. Maletz is the Claimant's treating physician and is, therefore, due greater deference. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1043-44 (2d Cir. 1997) (ruling opinion of psychiatrist who treated claimant for two-year period entitled to "great weight" as the treating physician). *See also Amos v. Director, OWCP*, 153 F. 3d 1051, 1054 (9th Cir. 1998), *amended* 164 F.3d 480 (1999), *cert. denied sub nom Sea-Land Service, Inc. v. Director, OWCP*, 528 U.S. 809 (1999); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998); *Rivera v. Harris*, 623 F.2d 212, 216 (2d Cir. 1980). I find that Dr. Maletz is entitled to treating physician status because he has regularly treated the Claimant since June 2000, performed the carpal tunnel surgeries, and developed and is overseeing the Claimant's overall medical treatment plan. Dr. Willetts, the Employer's physician, did not examine the Claimant after January 2001. While he did conduct an updated medical records review, Dr. Willetts based his opinion on the January 2001 physical examination and test results, and the records indicate that the Claimant's physical condition has worsened since that time. In fact, the post-hearing medical evidence shows that the Claimant's neck problems and headaches continued to worsen in August and October 2001, resulting in a referral to Dr. Doherty, a neck surgeon, who examined the Claimant and recommended cervical discectomy and fusion on November 16, 2001. In addition, Dr. Willetts failed to consider the effect of the Claimant's medications on his ability to perform work. I find that the Claimant was a credible witness, who testified that the medications impaired his ability to concentrate, stay alert, and talk normally, resulting in difficulty teaching, driving, and completing his usual crossword puzzle activities. Dr. Maletz, the treating physician, confirmed that the medications impaired the Claimant's ability to teach.

As previously mentioned, I find that the Claimant was a very credible witness regarding his physical capabilities and that he demonstrated a strong work ethic. At the hearing, the Claimant stated that he enjoyed his job and was proud of his peers' respect. The Employer gave him a commendation for developing the rigging instructor lesson plan, and a supervisor mentioned that it was the best plan that he had seen in twenty years. Even after the Claimant left work in December 2000, he continued to perform some gardening and other housekeeping duties to the extent of his physical capabilities. In addition, I note that Dr. Maletz believed that the Claimant possessed a strong work ethic based on his statements of wanting to return to a functional status, his performance of some home projects, and his total compliance with the therapeutic treatment.

Furthermore, I find that the investigatory evidence produced by the Employer does not serve to refute the Claimant's statements about his physical limitations nor demonstrate that he is capable of performing regular and sustained work. On the morning of February 6, 2001, two of the Employer's human resources representatives observed the Claimant shoveling snow from a sidewalk adjacent to his home, his back porch, and near and on top of his van for approximately 40 to 45 minutes. While there was testimony that the Claimant may have shoveled up to 10 inches of snow, the Employer's witnesses did not question the Claimant about nor did they have

any way of knowing whether the shoveling caused him any pain or discomfort. In fact, the evidence shows that the Claimant had an appointment with Dr. Maletz on that morning, and Dr. Maletz reported that the Claimant exhibited signs of clear discomfort. I note that the Claimant lived only one-half mile from the Employer's facility on a heavily-traveled road and apparently made no effort to hide his activities. The investigators also observed the Claimant for 45 minutes on another day working in his flowerbed for two five-minute intervals, carrying a 15-pound pail once across the yard, digging with a shovel for less than two minutes, watering his garden with a hose, and playing with his dog for two to three minutes, and, another occasion, putting oil in his van. I find that the evidence of these one-time activities are too limited and short in duration to contradict the credited medical opinion of Dr. Maletz that the Claimant is not capable of performing regular employment.

I will now turn to the question of whether the Claimant's disability is temporary or permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp*., 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. The determination of when maximum medical improvement is reached so that claimant's disability may be characterized as permanent is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). The parties stipulated that the Claimant has not reached maximum medical improvement. Accordingly, I find that the Claimant is temporarily totally disabled. At this point, I acknowledge the Employer's objection to the expedited nature of this hearing and its possible effect on my findings regarding the nature and extent of the Claimant's disability. All parties, including Dr. Maletz, anticipate an improvement in Claimant's condition and a possible return to some form of gainful employment. I note that the Employer's interests are adequately protected by section 22 of the Act which allows the Employer to seek modification once the Claimant reaches maximum medical improvement.

B. Compensation and Benefits Due

Based on the foregoing findings, I find that the Employer is liable for continuing temporary total disability compensation beginning on December 22, 2000, to be computed pursuant to section 8(b) of the Act at 66 2/3 percent of the stipulated average weekly wage of $987.87.

Although not specifically addressed in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News*

Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Accordingly, my order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

C. Medical Care

The Employer contests its liability for chiropractic treatment, psychiatric treatment for anxiety and depression, a hot tub for home use, and various medications. An employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984).

1. Chiropractic Treatment

At the hearing, the Claimant requested authorization for ongoing chiropractic treatment, and in its brief, the Employer objected to reimbursing the Claimant for any co-payments he made for chiropractic treatment not authorized. At the hearing, the Claimant testified that he paid $25 per chiropractic visit with Dr. Deveau, totaling $150 to $175. Chiropractic care has been reimbursable under section 7 since October 11, 1977, but only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. 20 C.F.R. §702.404 (1978); *Blanchard v. General Dynamics Corp.*, 10 BRBS 69, 70 (1979). The post-hearing medical evidence shows that, on October 24, 2001, Dr. Maletz reported that chiropractic treatment was not improving the Claimant's condition nor relieving his neck symptoms and that neck surgery was being pursued. Given this evidence, I find that an order of ongoing chiropractic care is not necessary at this time.

In addition, I find that the Claimant has failed to prove that the chiropractic care was intended to correct a subluxation as required by 20 C.F.R. §702.404; therefore, he may not recover any amounts that he made as co-payments for chiropractic treatment prior to October 24, 2001. Subluxation is defined as "[a] partial or incomplete dislocation." Taber's Cyclopedic

Medical Dictionary (16th Ed. 1989) at 1772. The Claimant produced the following evidence regarding his diagnosis as support for the compensability of chiropractic treatment. Dr. Maletz diagnosed the Claimant with "cervical discopathy and osteophytic change with facet arthritis several levels C5-6 and 6-7 cervical spine," recommending twice per week chiropractic treatment. CX 4 at 2. In his deposition, Dr. Maletz explained that he recommended chiropractic treatment as a form of physical therapy to address the limited range of motion in the Claimant's neck. CX20 at 9. Dr. Deveau's notes show that x-rays of the lumbar spine reveal decreased disk height with anterior osteophytes, bone spurs in the cervical spine, and disk herniations at C4-C5. CX6 at 2. Discopathy is defined as a "disease of an intervertebral cartilage (disk)." Dorland's *Illustrated* Medical Dictionary (28th ed. 1994) at 477. An osteophyte is defined as "[a] bony excrescence or outgrowth, usually branched in shape." Taber's Cyclopedic Medical Dictionary (16th Ed. 1989) at 1281. Finally, arthritis is defined as "[i]nflammation of a joint, usually accompanied by pain, swelling and, frequently, changes in structure." Taber's Cyclopedic Medical Dictionary (16th Ed. 1989) at 144. This evidence is simply inadequate to support a finding that the chiropractic treatment was intended to correct a subluxation, or dislocation, of the spine in accordance with 20 C.F.R. §702.404. Accordingly, the Employer is not responsible for reimbursing the Claimant for any co-payments he made for chiropractic treatment.

2. Psychiatric Counseling

The Employer objects to paying for psychiatric counseling because the Claimant did not file a claim for depression or psychiatric injury, the Claimant was treated for depression eight years ago, Dr. Maletz did not prescribe the counseling, and the Claimant's counselor, a social worker, is not qualified to render an opinion on the relationship between the counseling and the workplace injuries. Emp. Br. at 11-12. On this issue, the record evidence shows that Dr. Maletz wrote in his office notes that the Claimant's depression was secondary to his dysfunctional status. However, in his deposition, Dr. Maletz testified that Dr. Main, the Claimant's long-time primary care physician, referred the Claimant to a psychiatrist. Dr. Maletz also stated that he would have made a similar referral, if requested, because psychiatry was not within his area of expertise. The Claimant also produced a letter from Carla Marcus, a licensed social worker who has been providing the counseling, which states that the depression was work-related and that she had referred the Claimant to Dr. Martin Maloney, a psychiatrist, for medication evaluation. The Claimant did not offer any medical records or other evidence from Dr. Main or Dr. Maloney.

As previously noted, a claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In *Barbour v. Wood & Lothrop, Inc.*, 16 BRBS 300, 303 (1984), the Board allowed the recovery of payment for a licensed social worker, who performed biofeedback treatment, where the claimant's treating physician prescribed the treatment, referred the Claimant to the social worker, and followed the Claimant's progress throughout the treatment. After a careful review of the evidence, I find that the Claimant has not met his burden of showing that a qualified physician indicated the compensability of psychiatric treatment. The regulations that define "physician" at

20 C.F.R. §702.404 do not include licensed social workers; therefore, the Claimant cannot rely on Ms. Marcus' opinion on the compensability of her treatment. In addition, while Dr. Maletz opined that the depression was causally related to the workplace injuries, he admitted that psychiatry was not within his area of expertise. Furthermore, he did not prescribe psychiatric counseling, refer the Claimant to Ms. Marcus, or oversee the treatment with Ms. Marcus. Moreover, in *Turner*, the Board affirmed the denial of a claim for treatment by a pastoral counselor because the claimant failed to produce "explicit documentation of the individual's credentials" in order for the ALJ to determine whether the counselor was authorized to provide treatment. *Turner, supra*, at 258. Similarly, I find that the Claimant has failed to offer explicit documentation of Ms. Marcus' credentials sufficient to support the authorization of her services. Accordingly, the Employer is not required to pay for the Claimant's psychiatric counseling with Ms. Marcus at this time.

3. Hot Tub for Home Use

The Employer disputes that a hot tub is medically necessary or reasonable because it is palliative, not curative, treatment, and argued that a deep tub bath, hydrocollator, shower seat, or a one-year membership at a YMCA would adequately meet the Claimant's needs. In *Slade v. Coast Engineering & Manufacturing Co.*, (BRB Nos. 98-646 & 98-646A)(Feb.2, 1999) (Unpublished), the Board vacated an ALJ's finding that the employer was not liable for a medically prescribed jacuzzi. The Board held that when the record contains evidence that a qualified physician specifically recommends that claimant use a jacuzzi in his physical therapy program for home treatment, the fact that the treatment may be only palliative, and not curative, does not prevent employer from being liable if the jacuzzi is found to be both reasonable and necessary. Dr. Maletz, a qualified physician, prescribed the hot tub to treat the Claimant's total spine condition with moisturized deep heat. He stated that a tub or shower seat would not be adequate because it would not enable the Claimant to treat his neck with moisturized deep heat. In addition, Dr. Maletz explained that the Claimant needed to use the hot tub daily or twice daily in order to gain maximum medical benefit. He anticipated that regular, daily hot tub use would help alleviate the Claimant's pain and decrease the amount of pain medication and physical therapy with the ultimate goal of helping the Claimant return to a functional status. I find that the hot tub is a reasonable and necessary medical expense, pursuant to section 7 of the Act, despite the Employer's offer of a one-year YMCA membership. The Claimant credibly testified without contradiction that there were no clubs within his geographic area with a hot tub. In addition, I find that the testimony of John Elkins that he "believe[s]" the Employer has a hot tub or jacuzzi available for employee use across from the health center (TR2. at 33-34) is insufficient to establish that there is in fact a hot tub available to the Claimant that would meet his medical needs. I note that Dr. Maletz emphasized that the Claimant should use the hot tub at least once daily in order to achieve maximum medical benefit and that a hot tub in his home would enable him to meet that medical purpose.

4. Disputed Medications

The disputed medications are antidepressants, high blood pressure medications, headache medications, and Viagra. Consistent with my finding on psychiatric counseling, I find that the Claimant has failed to produce evidence from a qualified physician that the antidepressants are necessary to treat a work-related condition. Dr. Maletz opined that the Claimant's depression was related to the workplace injuries and stated that he would have referred the Claimant to a psychiatrist, if requested. However, his opinion is not sufficient to establish the compensability of the antidepressants because he acknowledged that this was not his area of expertise and he did not prescribe the medications or refer the Claimant to a psychiatrist. Similarly, Dr. Maletz admitted that hypertension is not within his area of expertise; therefore, the Claimant may not rely on his opinion to support the compensability of high blood pressure medication. Regarding the headache medications, the Drug Review Addendum, RX 15, shows that the Claimant was prescribed Celebrex and Imitrex to treat his neck condition and headaches. Dr. Maletz, who prescribed Celebrex to treat the neck condition, testified that it was related to the workplace injuries. In addition, the Claimant offered medical records from Dr. Criscuolo, who also prescribed Celebrex, which document that it was necessary to treat a work-related condition. However, I find that the Claimant has not produced any evidence that his migraines and need for Imitrex are work-related. Neither Drs. Maletz nor Criscuolo prescribed the Imitrex or opined that the migraines were related to the workplace injuries. Finally, I find that the Claimant has not offered any evidence that Viagra is necessary to treat a work-related condition. Even Dr. Maletz, the Claimant's treating physician, acknowledged that it is premature to determine whether there is a relationship between the need for Viagra and the workplace injuries. Accordingly, I conclude that the Claimant has demonstrated the compensability of Celebrex to treat the neck condition, but that section 7 of the Act does not compel the Employer to pay for the antidepressants, high blood pressure medications, Imitrex, or Viagra.

D. Attorneys' Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer will be granted 15 days from the filing of the fee petition to file any objection.

V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) The Employer, Electric Boat Corporation, shall pay to the Claimant continuing temporary total disability compensation benefits calculated from the average weekly wage of $987.87, pursuant to section 8(b) of the Act, beginning on December 22, 2000, and Electric Boat Corporation shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

(2) The Employer, Electric Boat Corporation, shall pay for all reasonable and necessary medical expenses associated with the Claimant's disability condition, pursuant to section 7 of the Act, including the cost to purchase, install, and maintain a hot tub for home use and prescriptions for Celebrex;

(3) The Claimant's attorney shall file, within thirty (30) days of receipt of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to comment thereon; and

(4) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A
DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd